No. 15932

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

C. H. ELLE CONSTRUCTION CO.,
a corporation and
ST. PAUL-MERCURY INDEMNITY CO.,
a corporation,

Appellants,

vs.

WESTERN CASUALTY AND SURETY COMPANY,
a corporation,

Appellee.

Brief of Appellee

Appeal from the United States District Court for the District of Idaho, Eastern Division

O. R. BAUM
RUBY Y. BROWN
Residence: Pocatello, Idaho
BEN PETERSON
Residence: Boise, Idaho
Attorneys for Appellee

GATEWAY PRINTERS—POCATELLO

No. 15932

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

C. H. ELLE CONSTRUCTION CO.,
a corporation and
ST. PAUL-MERCURY INDEMNITY CO.,
a corporation,

Appellants,

vs.

WESTERN CASUALTY AND SURETY COMPANY,
a corporation,

Appellee.

Brief of Appellee

Appeal from the United States District Court for the District of Idaho, Eastern Division

O. R. BAUM
RUBY Y. BROWN
Residence: Pocatello, Idaho
BEN PETERSON
Residence: Boise, Idaho
Attorneys for Appellee

SUBJECT INDEX

TABLE OF AUTHORITIES
CASES CITED

Page

TEXTS

STATUTES

No. 15932

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

C. H. ELLE CONSTRUCTION CO.,
a corporation and
ST. PAUL-MERCURY INDEMNITY CO.,
a corporation,

Appellants,

vs.

WESTERN CASUALTY AND SURETY COMPANY,
a corporation,

Appellee.

Brief of Appellee

STATEMENT OF CASE

The defendant, Western Casualty and Surety Company, a corporation, issued its liability policy to William S. Gagon, Soda Springs, Caribou County, Idaho, describing therein a certain 1954 Chevrolet truck. The policy is described as UI-518973. The occupation of the named insured, William S. Gagon, in the policy is decribed as "Lumber Business, Builder, Hardware Dealer, Self, Soda Springs." The policy

of insurance contained the usual "omnibus clause" which reads as follows:

> "With respect to the insurance for bodily injury liability and for property damage liability, the unqualified word 'insured' includes the named insured and also includes any person while using the automobile and any person or organization legally responsible for the use thereof, provided the actual use of the automobile is by the named insured or with his permission." (R. 52).

The policy was issued for commercial purposes as shown by the policy. The purposes for which the automobile was to be used are commercial-Class 5CA. Paragraph 5CA of the policy in question states:

> "The term 'commercial' is defined as use principally in the business occupation of the named insured as stated in Item 1 (Item 1 says: Lumber Business, Builder, etc.) including occasional use for personal pleasure, family and other business purposes." (R. 52).

At a time when this policy was in full force and effect, and on or about the 22nd day of Auguist, 1954, an agent and employee of the plaintiff, C. H. Elle Construction Company, while acting in the line, course, and scope of his employment as an agent for C. H. Elle Construction Co., went to the place of business operated by Mr. Gagon, the named

insured in the policy above referred to, to borrow the Chevrolet truck described in said policy of insurance. Mr. Gagon, the named insured in the Western Casualty policy, was not available. M. Burke Horsley, the agent of C. H. Elle Construction Co., one of the plaintiffs herein, then sought permission to borrow the truck from Jessie Gagon, wife of William S. Gagon, the named insured. Jessie Gagon gave the keys to the truck to M. Burke Horsley, and he drove away in the business of C. H. Elle Construction Co. While he had possession of the truck under these circumstances, he was involved in an automobile accident, as a result of which accident the husband of Mary Lou Campbell and the father of Terry Ray Campbell and Curtis Howard Campbell was killed. The heirs of Arnold Campbell brought a suit in the District Court of the Fifth Judicial District, in and for the County of Bannock, State of Idaho, against the C. H. Elle Construction Co., M. Burke Horsley, the agent of C. H. Elle Construction Co., and William S. Gagon. The plaintiffs in the State Court predicated the liability against William S. Gagon upon the theory that M. Burke Horsley was using the truck belonging to Gagon with the latter's permission (as provided for predicating liability under the owners liability statute in Idaho). (R. 154). In the State Court action judgment was rendered in favor of the plaintiffs against C. H. Elle Construction Co., and against M. Burke Horsley, an employee of C. H. Elle Construction Co. Defendant Larsen was granted a non suit. Judgment in that action was entered in favor of William S. Gagon upon the finding that the truck referred to in the Western Casualty policy was not being

used with the permission of William S. Gagon, the named insured, so as to be a basis for owner's liability. (R. 40).

In the amended complaint of the plaintiffs in the State Court action, and in paragraph 4 thereof, it is alleged that the truck operated by Horsley was being operated by him with the permission and consent of the named insured, William S. Gagon (R. 154). In the answer of the defendant Gagon it was expressly denied that the truck was being used with his permission and consent. (R. 160). In the answer of C. H. Elle Construction Co., filed by Merrill and Merrill it is admitted that Gagon was the owner of the truck, but each and every other allegation in said complaint was denied, which is a denial that the truck was being operated with the consent of the said William S. Gagon. (R. 168). In the answer of M. Burke Horsley in the State Court action it was admitted that William S. Gagon was the owner of the 1954 Chevrolet truck, but it was denied that the truck was being operated with the permission and consent of the said William S. Gagon. (R. 173). Thus the issue of whether or not the truck was being operated with the consent of William S. Gagon was squarely put. The appellant herein, St. Paul Mercury and Indemnity Company, had written liability insurance for C. H. Elle Construction Co., which policy inured to his benefit, and counsel, namely, Merrill and Merrill, tried the case in the State Court for St. Paul Mercury and Indemnity Company. Under these circumstances, opportunity to try the issue of permissive use was available to the appellant herein, and that issue was tried and resolved in favor of William S. Gagon, the judgment reflecting that

the truck was not being used with the permission and consent of Gagon. (R. 40-41).

In order to find for the plaintiff in the State Court action and against C. H. Elle Construction Co. and M. Burke Horsley, it was necessary for the jury to have found that M. Burke Horsley was operating the truck negligently and that at the time of the accident he was an agent, servant, or employee of the defendant C. H. Elle Construction Company and was acting in the line, course, and scope of his employment. To have found favorably to Gagon in the State Court action, it is imperative that the jury find that Horsley was not using the truck with the permission of Gagon. The Appellants herein at the time the State Court action was tried could have admitted insofar as C. H. Elle Construction Co. and M. Burke Horsley are concerned that the truck was being operated with the permission of William S. Gagon. This they did not admit, but, on the contrary denied.

The judgment in the State Court action where Mary Lou Campbell, et al, were plaintiffs and C. H. Elle Construction Co., a corporation, M. Burke Horsley, and Max Larsen, and Gagon were defendants, was paid by the appellant herein as the insurance carrier of C. H. Elle Construction Company. Judgment in the amount thus paid, plus some costs and attorney fees, is sought in the instant action against Western Casualty and Surety Company upon the theory that C. H. Elle Construction Company and M. Burke Horsley became an additional insured under the policy of the Western Casualty Company, and said company under the policy

was obligated to defend the State Court action and pay on behalf of C. H. Elle Construction Co. and M. Burke Horsley any judgment recovered (R. 19 and 20).

The facts of the instant case were submitted to the trial court upon stipulation, request for admissions, and depositions of William S. Gagon, M. Burke Horsley, C. H. Elle and Jessie Gagon. (R. 61-102, inclusive).

SUMMARY

The defendant, Western Casualty and Surety Company, appellee herein, defended the suit in the United States District Court and raised the following questions in defense thereof.

FIRST: That the issue of whether or not the Chevrolet truck owned by Gagon was being operated with his permission, i. e., the permission and consent of the named insured, had already been decided in the State Court action and that that issue cannot be again tried in the instant case, and that it is immaterial whether the permission springs from the owner's liability statute in Idaho or from a construction of the Western Casualty Company insurance policy, permissive use of the truck being the same whether applied to the owner's liability statute or whether applied to the Western Casualty Company policy.

SECOND: That M. Burke Horsley was not operating the truck of William S. Gagon with his permission as is

required by the Western Casualty Company policy, the evidence, and all of the evidence, in this case being undisputed either in the instant action or in the State Court action, all of the evidence of all of the witnesses being to the effect that William S. Gagon himself did not grant permission to use the truck, but such permission was granted by Jessie Gagon, wife of the named insured.

THIRD: That owner's liability as provided for in Section 49, 1404, Idaho Code, is secondary, and the owner cannot be held liable unless the operator of the truck is made a party and unless collection of the judgment cannot be had against the operator, and, further, the statute provides for subrogation on the part of the owner against the operator in the event the owner is required to pay a judgment under the liability imposed by Section 49-1404. The liability of the owner of the truck beyond the liability imposed by the statute could not be enlarged by the wording of the policy of insurance, and the liability of the insurance carrier can in no case be greater than that of Gagon for whom the insurance was written.

FOURTH: That the coverage of the policy written by Western Casualty and Surety Company did not extend to the truck in the use to which it was being put, namely, in the business of the C. H. Elle Construction Company.

FIFTH: The filing of the Form No. S. R. 21, evidence of financial responsibility, could have no force or effect because by statute any evidence of the filing of the form is

prohibited. Section 49-1511, Idaho Code.

SIXTH: The C. H. Elle Construction Co., a corporation, and M. Burke Horsley were defendants in the State Court and were defended by the same counsel that instituted the instant action and in the State Court the St. Paul- Mercury Indemnity Co., a corporation, appeared and defended on behalf of C. H. Elle Construction Co., a corporation, and M. Burke Horsley and took the position that the truck was not being driven with the permission of Wm. S. Gagon, while in the instant action they take the exact opposite position and allege that it was being driven with permission.

ARGUMENT AND AUTHORITIES

I.

The defendant contends that the trial court properly held that the issue, i.e., whether or not M. Burke Horsley, in the employment of C. H. Elle Construction Co., was using the truck with the permission of the named insured and owner, William S. Gagon, had already been decided in the State Court action, and, having been decided in the State Court action, that decision is final and conclusive. In the case of *Maryland Casualty Company vs. Lopopolo,* 97 F. 2d 554 (9th Circuit) it is held that a judgment against an insured and his son for injuries arising out of an automobile accident based on the theory that the son, who had permission, was operating automobile, was conclusive and that the insurer could not defend insured's action on liability

policy on ground that no judgment had been obtained against insured, on the theory that someone else was operating the automobile who did not have the permission of the owner. The essence of the action above referred to was to again try the question of who was operating the automobile, whether someone with the permission of the named insured or someone who did not have the permission.

In the *Lopopolo* case just cited the following language appears:

> "There was in the Donato case, a conflict of evidence as to whether, at the time of the collision, appellee's automobile was being operated by Jack Lopopolo, as claimed by Donato, or whether, as claimed by appellant, it was being operated by Jack's younger brother, Dan Lopopolo, who, it is conceded, never had appellee's permission to operate the automobile. This conflict was, by the jury's verdict, resolved in Donato's favor."

This court held that a determination of that fact was final and could not be reviewed in the action.

In the instant case the judgment entered in favor of Gagon and against the plaintiffs with respect to permissive use of the automobile by the owner Gagon was conclusive and finally settled in the State Court case. Some cases cited by appellant, and particularly the case of *Dobbins vs. Barns* (9th Circuit), 204 F. 2d, 546, we do not believe is in

point because in that case there was no opportunity to fully litigate the issue in the other action. In the case of *Dobbins vs. Barns* the holding in the case of *Ohio Casualty Company vs. Gordon,* 95 F. 2d, 605, is referred to. In the *Dobbins* case, relied upon by appellants, the following appears:

> "Although sometimes parties arrayed as co-parties on the record may nevertheless be adversaries in fact as to an issue, Ohio Casualty Ins. Co. vs. Gordon, supra, yet such cannot possibly be the case here for the Tax Court would be without jurisdiction to entertain any such issue or controversy as between these two parties."

In the case of *Ohio Casualty Insurance Company vs. Gordon,* supra, it is held:

> "But the formal arrangement of the parties on the record is not important (Chicago, Rock Island & Pacific R. Co. vs. Schendel, 270 U. S. 611, 615, 46 S. Ct. 420, 422, 70 L. Ed. 757, 53 A. L. R. 1265), and if coparties on the record were in fact adversaries as to an issue, and such issue was in fact litigated and they had full opportunity to contest it with each other, either upon the pleadings between themselves and the plaintiff or upon cross-pleadings between themselves, they are concluded by the adjudication of such issue in a subsequent controversy between each other."

In support of this statement many cases are cited in the footnote. The rule recognized in the *Dobbins* case and clearly set forth in the *Ohio Casualty vs. Gordon* case applies in full force and vigor to the instant action.

In the State Court case in which Mary Lou Campbell and her children were plaintiffs and C. H. Elle Construction Co. was defendant and in which the appellant herein, St. Paul Mercury Indemnity Company, through their counsel, were actually in the case by their own admission, ample opportunity was given to them to fully litigate the issue as to whether or not the truck was being operated with the permission of Gagon. In the answer of C. H. Elle Construction Co., their insured, St. Paul Mercury Indemnity Company could have admitted the permissive use of the truck as alleged by the plaintiff and could have called witnesses or could have done any other appropriate thing to bring about a holding that the truck was being used with the permission of Gagon. We say, therefore, that ample opportunity was afforded them in the State Court case to prove permissive use, and if they had admitted the truck was being used with Gagon's consent, that issue could have been tried as between them and the defendant Gagon. This they did not elect to do and are foreclosed from again raising the issue by the holding of the trial court and by the array of authorities cited in the *Ohio Casualty Insurance Company vs. Gordon* case, supra. There is in this case no question about how Horsley came into possession of the Gagon truck. No other facts could have been elicited or proved to shed light on this transaction; all parties to the action in the State Court and in this action

agree that Jessie Gagon furnished the keys to the truck. This Court's attention is, therefore, respectfully called to the authorities cited herein and to the following cases:

Chicago, Rock Island & Pacific R. Co. vs. Schendel, 270 U. S. 611, 615, 46 S. Ct. 420, 422, 70 L. Ed. 757, 53 A. L. R. 1265;

Corcoran vs. Chesapeake & Ohio Canal Company, 94 U. S. 741, 744, 745, 24 L. Ed. 190;

Louis vs. Brown Township, 109 U. S. 162, 168, 3 S. Ct. 92, 27 L. Ed. 892;

Atchison, T. & S. F. R. Co. vs. A. B. C. Fireproof Warehouse Company, 8 Cir., 82 F. 2d 505, 515;

City of El Reno vs. Cleveland-Trinidad Paving Company, 25 Okl. 648, 107 P. 163, 164, 165, 27 L. R. A., N. S. 650;

Baldwin vs. Hanecy, 204 Ill. 281, 68 N. E. 560, 562;

National Marine Bank vs. Heller, 94 Md. 213, 50 A. 521, 523;

Waldo vs. Waldo, 52 Mich. 91, 17 N. W. 709; Id., 52 Mich. 94, 17 N. W. 710;

Freeman on Judgments, 5th Ed., Vol. 1, S. 425.

In the case of *Williams Estate*, 223 P. 2d 248, it is held:

> "Under doctrine of 'collateral estoppel' where subsequent litigation is based upon a different cause of action from that upon which prior suit was based, prior judgment is conclusive between parties in such case as to questions actually litigated and determined by prior judgment but is not conclusive as to questions which might have been but were not litigated in original action."

In the original action in the State Court the defendants were C. H. Elle Construction Co., a corporation, M. Burke Horsley, an admitted employee of the C. H. Elle Construction Co., a corporation, and upon whose negligence the action was based, and Wm. S. Gagon (there was another party defendant but a non-suit was granted as to such defendant by the State Court hence no further reference will be made to such party). The action was defended by the same counsel that brought the instant action, hence it can be readily assumed, and assumed without contradiction, that the St. Paul-Mercury Indemnity Co., a corporation, was actively participating in the action in the State Court as it was up to that company to defend its insured the C. H. Elle Construction Co., a corporation, and its employees, among which was M. Burke Horsley, all of which it did, and in that action in the State Court both Horsley and the C. H. Elle Construction Company took the position that the truck was being driven without permission of Wm. S. Gagon, and Gagon likewise took the same position and the jury found in favor of Ga-

gon on that issue. In the instant action the same parties namely C. H. Elle Construction Co., a corporation, and St. Paul-Mercury Indemnity Co., a corporation, take the position that the truck was being driven with permission. We maintain that no litigant can take inconsistent positions on an issue that was one of the paramount issues in this action and in the State Court action. We desire to call the Court's attention to the particular paragraphs in the various Exhibits, namely:

In the Campbell vs. Elle Construction case, State Court, paragraph 4 (R. 154) reads as follows:

> "That at all times mentioned herein, defendant William S. Gagon, was the owner of a 1954 Chevrolet truck, bearing 1954 Idaho license, 3C-1010; that at such times the defendants, M. Burke Horsley and Max Larsen, were operating such truck with the permission and consent of the owner, William S. Gagon."

and the answer of C. H. Elle Construction Company in the State Court, (R. 167-168) as well as the answer of M. Burke Horsley in the State Court (R. 173), read as follows:

> "Answering Paragraph IV of said Second Amended Complaint, this answering defendant admits that William S. Gagon was the owner of a 1954 Chevrolet truck bearing 1954 Idaho License plates 3C-1010, but denies each and every other allegation contained in said paragraph."

The same counsel prepared the answers that prepared the complaint in the instant case a portion of paragraph V (R. 11) of the Amended Complaint reads as follows:

> "That on or about the 22nd day of August, 1954, the above-mentioned vehicle owned by William S. Gagon was being driven, with the consent and permission of William S. Gagon, by one M. Burke Horsley - - - -."

In the case of Loomis vs. Church, 76 Ida. 87, 277 P. 2d 561, the Court had the following to say:

> "Where litigant, by means of sworn statements, obtains a judgment, advantage or consideration from one party, he will not thereafter, by repudiating such allegations and by means of inconsistent and contrary allegations or testimony, be permitted to obtain a recovery or a right against another party, arising out of the same transaction or subject-matter."

In *5A Am. Jur.* Page 192, Sec. 192, the following appears:

> "The cases generally support the proposition that a judgment in an action by a third person against one insured under an automobile liability policy may be invoked as conclusive in its favor by the insurer in a subsequent action against it, if the issue decided in such prior action was material to the decision

> thereof and is identical with the issue claimed in the later action to have been adjudicated even though the insurer was not a nominal party to the first suit."

The above cases are clear authority for the proposition that the issue of permissive use, having been heretofore fairly presented and decided, is not subject to readjudication in the instant action; particularly is this true in the instant case where the appellants herein had ample opportunity to competently try the issue.

II.

The Western Casualty policy of insurance provides that the insurance is in effect provided the actual use of the automobile is by the named insured or with his permission. It is clear from the record in this case that M. Burke Horsley did not have permission of the named insured, William S. Gagon. He did, however, have the permission of Jessie Gagon who worked part time in the Gagon Lumber Yard. The appellee herein contends that permission of the wife in such case is not permission of the named insured. In the case of *Ohio Casualty Insurance Company vs. Goodman,* 22 P. 2d. 997, the Supreme Court of Oklahoma held:

> "It is to be observed that said extended coverage clause does not include the owner of the car. Had the parties to the contract desired that this extended coverage, which permitted the car to be operated by the express or implied consent of the assured named in the

> policy and the owner of the car, it would have been easy to have incorporated such provision in said policy. This coverage clause did not apply to the owner of the car."

Ownership of the car under the authorities is not the vital issue. The fact that Jessie Gagon was employed part time as a bookkeeper in the Gagon Lumber Yard would not be sufficient so that she could grant the necessary permission. Appellants in their brief cite many authorities and argue vehemently that this authority to use the automobile may be express or implied. We submit that there is no express or implied authority for Jessie Gagon to authorize the use of the truck by Horsley in the business of C. H. Elle. Jessie Gagon testified that to her knowledge Mr. Horsley had never borrowed the equipment of the Gagon Lumber Yard before. (R. 111). Mrs. Jessie Gagon also testified that she had never been authorized by her husband to loan the truck or any of the Gagon Lumber Yard equipment. (R. 114), and that none of the equipment had ever been loaned to M. Burke Horsley before. (R. 115). William S. Gagon in deposition testified that he had never loaned any equipment of the Gagon Lumber Yard to M. Burke Horsley, an employee of C. H. Elle Construction Co. (R. 121). He further testified that he had never rented the truck to M. Burke Horsley. (R. 125). William S. Gagon likewise testified on deposition that he had never authorized Mrs. Jessie Gagon to loan the truck in question. (R. 126), or to loan any equipment of the company. (R. 126). The fact that M. Burke Horsley, employee of C. H. Elle Construction Co. had never at any time before

borrowed any equipment from William S. Gagon or the Gagon Lumber Yard certainly does not establish any implied authority to loan the truck, nor does it establish any practice of loaning which might give rise to an implied permission. Likewise the record is clear that Jessie Gagon did not have permission or authority as an agent, or wife, to loan the truck in question and had never on any occasion previously loaned the truck, nor had Horsley, the employee of Elle, on any previous occasion borrowed the truck. Under the terms and provisions of the policy, permissive use of the truck could be granted only by the named insured. By the very terms and conditions of the policy itself, Jessie Gagon was not a named insured (R. 50-57), and the fact that she might be part owner, as wife, of community property, would not cause her to be a named insured. She, therefore, was without authority to grant permission to use the truck within the meaning of the policy of insurance or within the meaning of the owner's liability law in Idaho, and did not, either by direct authority or by implication, have the power as an agent to loan the truck in question.

Jessie Gagon, the wife of the named insured, did not have authority to grant permission to Horsley to borrow the truck. She did not have authority to do so by virtue of the marital status because the wife is not necessarily the agent of the husband for such purposes, and under the Idaho law of community property the husband is the manager and has control of all the community property. Marital status, therefore, would surely not be sufficient to create the authority in her to grant permission to use the truck. The fact that

Jessie Gagon was a part-time employee and bookkeeper at the business of the Gagons could not possibly be sufficient to authorize her to loan the truck. A person serving in the capacity of a part-time bookkeeper such as she did would have no authority to loan equipment of the company, and this is fortified by the fact that neither Horsley nor Elle Construction Co., nor anyone else, had ever borrowed any equipment upon the authority of Jessie Gagon, or, for that matter, upon the permission of William S. Gagon, the named insured. It follows, therefore, that the truck was not being operated by Horsley, agent of C. H. Elle Construction Co., with the permission of the named insured.

III.

Any liability of William S. Gagon for whom the appellee, Western Casualty and Surety Company, had written his policy of insurance, would have to be predicated upon Section 49-1404, Idaho Code. Said section in part provides:

> "1. Responsibility of owner for negligent operation by person using vehicle with permission—Imputation of negligence. Every owner of a motor vehicle is liable and responsible for the death of or injury to a person or property resulting from negligence in the operation of such motor vehicle, in the business of such owner or otherwise, by any person using or operating the same with the permission, expressed or implied, of such owner, and the negligence of such person shall be imputed to the owner for all

purposes of civil damages."

Subsection 3 of the same section provides:

> "3. Operator to be made party defendant—Recourse to operator's property. In any action against an owner on account of imputed negligence as imposed by this section the operator of said vehicle whose negligence is imputed to the owner shall be made a party defendant if personal service of process can be had upon said operator within this state. Upon recovery of judgment, recourse shall first be had against the property of said operator so served."

Subsection 4 of said section provides:

> "4. Subrogation of owner to rights of person injured —Recovery from operator—Bailee and driver deemed operators. In the event a recovery is had under the provisions of this section against an owner on account of imputed negligence such owner is subrogated to all the rights of the person injured and may recover from such operator the total amount of any judgment and costs recovered against such owner. * * *."

Appellant contends very frankly that the liability of the Western Casualty and Surety Company, appellee herein, is primary and that the liability of the appellant, St. Paul Mercury and Indemnity Company, is secondary. The lia-

bility of the Western Casualty and Surety Company under their policy of insurance issued to William S. Gagon could not be any greater than the liability of William S. Gagon; the whole basis of liability of Gagon under the circumstances of this case being fixed by statute, it is clear from the statute that his liability is secondary. How then can it be successfully argued that the liability of his insurance carrier is primary? Before an action under the statute could be successfully maintained against William S. Gagon, an action would also have to be brought (if service could be made) against M. Burke Horsley, the operator of the Gagon truck, and Gagon would have no liability under the statute, nor would the Western Casualty Company, his insurer, until after recourse first had to operator's property.

It was clearly the intent of the Legislature that the owner of a car would have no liability under the owner's tort liability statute unless the operator was made a party and service of process could be had upon him, nor would the owner of the car be required to pay any judgment until after recourse could be had against the owner of the property. It is, therefore, clearly the intention of the Legislature that the liability of the owner is not primary, but secondary. In the case of Campbell, et al, vs. C. H. Elle Construction Company, M. Burke Horsley and William S. Gagon, the liability of C. H. Elle Construction Company and the liability of his insurer, appellants herein, St. Paul Mercury and Indemnity Company, is derived from the negligence of M. Burke Horsley, an agent, servant and employee of C. H. Elle Construction Co., and the liability of the master and servant

under such circumstances is equal.

In the case of Anneker vs. Quinn-Robbins Co., an Idaho Corporation, and Independent School District of Boise City, defendants, the Supreme Court of Idaho had the following to say:

> "The occurrence involved in this case did not grow out of the operation of respondent School District's transportation system; hence the liability coverage afforded by the policy cannot be extended to such occurrence. The parties did not intend that the policy encompass any liability coverage except as authorized by the legislative enactment . . ."

This case is found in the advance sheets of 323 P. 2d, P. 1078, No. 5 dated May 16, 1958.

In the case of Ford vs. City of Caldwell, 79 Ida, , 321 Pac. 2d 589. No. 2 advance sheets dated March 14, 1958, the Supreme Court of the State of Idaho, had the following to say:

> "Law in force at time of making of insurance contract becomes a part of contract and is read into it, but such rule does not extend to statute enacted after making of contract."

It, therefore, follows that the liability of the appellees herein is secondary to the liability of both the operator of

the truck and the person responsible for his negligent conduct, to-wit, C. H. Elle Construction Co., and, in turn, his insurance carrier, St. Paul Mercury and Indemnity Company, appellant herein. The liability of the appellee cannot be greater by reason of the existence of the policy than the liability imposed by statute.

IV.

The policy written in this case and an exhibit (R. 50-56) provides that the purposes for which the automobile described in the policy, i.e., the Gagon truck, was to be used are commercial—Class 5CA. 5CA of the policy states:

> "The term 'commercial' is defined as use principally in the business occupation of the named insured as stated in Item 1 (Item 1 says: Lumber Business, Builder, etc.) including occasional use for personal pleasure, family and other business purposes." (R. 52).

It is stipulated and admitted that the truck at the time of the accident was being used in the business of Elle Construction Co., and not in the business of William S. Gagon, —Lumber Business, Builder, etc. It was not contemplated by the policy of insurance that the insurance would inure to the benefit of the business being conducted under the name and style of C. H. Elle Construction Co., Inc.

V.

Appellants contend that the Western Casualty and Surety Company, appellee, acknowledged their liability by their having filed form No. S. R. 21, evidence of financial responsibility provided for by the Idaho law upon the happening of an accident under circumstances like the one in question.

> "49-1511. Matters not to be evidenced in civil suits.—Neither the report required by section 49-1504, the action taken by the commissioner pursuant to this act, the findings, if any, of the commissioner upon which such action is based, nor the security filed as provided in this act shall be referred to in any way, nor be any evidence of the negligence or due care of either party, at the trial of any action at law to recover damages."

Appellee takes the position that S. R. 21 is incompetent evidence for any purpose simply by the very terms of the statute requiring the filing of such a document. The statute, we think, is very clear and prohibits the consideration of such filing as evidence of any kind. The statute prohibits reference to the filing of the S. R. 21 in any case.

It would be a very strange situation if an insurance agent by filing form No. S. R. 21 could bind the company and thus admit insurance coverage in a case where no coverage in fact existed. The filing of the S. R. 21 certainly

would not be conclusive evidence that the company filing the form had extended coverage to the particular situation. Whether or not a particular insurance policy affords coverage under particular facts and circumstances has long been a vexing problem to lawyers and to judges, and for appellant to contend that the determination of this issue by an insurance agent was final and conclusive, to us seems completely untenable. We think a different situation would apply were the contest between the insured and his own company. In such case it is conceivable that a company would be estopped to deny coverage where they had filed S. R. 21 on behalf of their insured, but such is not the case here. The Western Casualty and Surety Company appeared in the trial of the case in State Court and defended its insured, William S. Gagon, and this contest is not between William S. Gagon and named insured and themselves, but is between Western Casualty and Surety and the appellant herein, which presents an entirely different situation.

We respectfully submit, therefore, that the judgment of the trial court should be affirmed.

Respectfully submitted,

O. R. BAUM
RUBY Y. BROWN
Residence: Pocatello, Idaho

BEN PETERSON
Residence: Boise, Idaho
ATTORNEYS FOR APPELLEE

Receipt of service of three copies of the above brief is hereby acknowledged this 18 day of July, 1958.

A. L. MERRILL
R. D. MERRILL
W. F. MERRILL
Attorneys for Appellants
Residence: Pocatello, Idaho

APPENDIX

EXHIBITS